Fama: I have been with Cozen O’Connor for 11 years, focusing on defending high profile products liability actions in state and federal courts nationwide. Most of my cases involve class action lawsuits and multidistrict litigation. For example, I am actively engaged in class action litigation arising from industry-wide pet food recalls that occurred earlier this spring — in addition to defending a major snack food manufacturer in cases stemming from salmonella poisoning claims. My practice also involves litigation over diacetyl, the chemical used in butter flavoring and often found in microwave popcorn. Another interesting area of my practice involves counseling clients on issues of origin labeling.

Purtos: I have been handling products cases since 1989. Prior to joining Cozen in 2001, I worked as associate general counsel for a major tractor manufacturer, overseeing their products liability matters throughout the United States. Within the last few years, much of my practice has been devoted to toxic tort litigation and food products litigation, with a geographic focus in California and Nevada.

Editor: Product safety has improved over the years, yet we’re still seeing disasters and mounting numbers of suits. What are some emerging areas for products liability?

Purtos: Products have gotten safer, and I think that is a result not only of improvements in the technology and technology, but also pressure from products liability litigation. Manufacturers have been forced to make their products safer, and obviously that is a good thing. Nevertheless, fewer injuries does not mean there are fewer lawsuits. In California and elsewhere, “product perjury” lawyers have become “trial lawyers,” which means they are bringing lawsuits even when no personal injury has occurred, or is even likely to occur.

Editor: Are there specific strategies that plaintiffs’ attorneys are using to gain ground?

Fama: One troubling trend is the increase in so-called no-injury class action lawsuits. These claims are for injuries that do not involve personal injury, but rather economic loss. In some states, the assertion is that the plaintiff would not have purchased the product had it not been properly labeled or had it not contained a deficiency, poten- tial to cause damage or injury. The mea- sure of damage, in one instance, might be the amount the product multiplied by the number of purchasers alleged to have been affected by the mislabeling. These claims blur the distinction between tort and contract.

Fama: What I would say is that this area is so new that corporate America is just beginning to develop responses to these types of claims. In addition, I think the defense bar has been the victim of its own success to the extent that, when these no-injury claims were first brought, many trial lawyers were just too busy to devote the resources that served to educate the plaintiffs’ bar on how to tailor their cases and survive motions to dismiss. In time, the pressure shifted to manufacturers who — because it was their brand reputation on the line — were very reluctant to be in the public eye as a consequence of litigation.

Purtos: In California, we have seen many no-injury cases, especially involving food products, building materials and toxic exposure claims. There has been an explosive growth in medical monitoring class actions. Groups of people that have been taken for a drug or been exposed to a chemi- cal in the workplace have not become ill, but still sue, as a class, to receive medical monitoring to look for illness. In many cases, most class members are not even likely to become ill.

California has also developed the concept of the “private attorney general,” where trial lawyers, claiming to act for the good of the public, bring lawsuits to force manufacturers to issue product warnings. Very often these are unneces- sary actions where there is no one who doesn’t consume the products. Typically, the only people who benefit are plaintiffs’ lawyers.

Purtos: To be sure, in the food area, the cases began with mislabeling claims. For example, the product label lists 11 grams of fat per portion. A scientist analytical study shows 13 grams. No injury to anyone, but a demon- strated, although slight, problem with labeling. Another issue arises with prod- ucts holding themselves out as “healthy” or “low carb.” There is a great deal of room for argument in this situation, and the plaintiffs’ bar is quick to make every conceivable claim that the public is being misled.

Fama: Another area where deceptive trade practices litigation has been invoked by the plaintiffs’ bar has to do with warnings. The recent Senate report on the presence of same- rated fats, trans fats, trace amounts of environmental mercury, or benzene, and so on, requires the manufacturer to pro- vide specific warnings regarding the exist- ence and nature of these components or characteristics to all potential purchasers. Taken to its extreme, each can of soda or frozen donut would require a 10-page warning manual. Much of the warnings litigation is simply ridiculous, but the number of cases based upon this kind of reasoning is definitely on the increase.

Fama: Plaintiffs’ attorneys are also using these statutes — state consumer protection and deceptive trade practices laws — to try to create private consumer class actions where none existed in the past. I am defending an action on behalf of a client who labeled their product “Made in the USA,” and the claim is one of improper labeling. This type of claim is usually governed by Federal Trade Commission (FTC) regula- tions, which do not authorize a private suit of action. The plaintiffs’ bar is attempting to utilize various state statutes which do permit such a cause of action to get around the FTC restrictions.

Editor: What steps can companies take to anticipate these litigation trends?

Fama: The best way to anticipate litigation trends is to proactively engage in monitoring the media, reading trade pub- lications, attending seminars, speaking with industry colleagues, and, of course, seeking the advice of counsel. Addition- ally, it is essential that the company have open lines of communication between and among its various depart- ments and units. One fairly frequent recipe for disaster is when the company’s research and development people change a formula for a particular product — say, the fat level in a milk product — but neglect to communicate that fact to the marketing group, which continues to label it a low-fat product.

Purtos: In addition, manufacturers need to keep a close eye on what is underway in Washington and in their local state house. They should work with their industry groups to stay abreast of current legislation. In California, for example, Proposition 65, which started out as a California initiative to promote clean water, now on the books as a major area of liability requiring manufac- turers to warn consumers of even minute quantities of various substances in con- sumer products, from traces of lead in chocolate to minute quantities of vinyl chloride in food packaging. This legislation has penetrated virtually every area of California’s commerce, from gas stations, to hotels, to hospitals, to hardware stores. Manufacturers else- where should be on high alert to examine enactment of similar undertakings in their states.

Editor: The food industry has been particularly hard hit this year.

Fama: One area in the food industry that I have been monitoring pretty closely is the potential for consumer-driven diacetyl lawsuits. As I have said, the chemical compound often found in artificial butter flavoring and linked to lung disease in microwave popcorn workers. Needless to say, the plaintiffs’ bar has considerable interest in this subject. The worst-case scenario would be no-injury class action litigation, where every purchaser of microwave pop- corn, whether injured or not, is a potential member of the class.

Purtos: The food industry has been hit hard, but it will be fine. A few years ago in California, there was an explosion of mold claims, and many product action industry manufacturers thought their busi- nesses would be crippled. The defense bar fought the science and did a good job of what none existed in the past. I am defending an action on behalf of a client who labeled their product “Made in the USA,” and the claim is one of improper labeling. This type of claim is usually governed by Federal Trade Commission (FTC) regula- tions, which do not authorize a private suit of action. The plaintiffs’ bar is attempting to utilize various state statutes which do permit such a cause of action to get around the FTC restrictions.

Editor: What new regulations are we seeing that could impact the food indus- try?

Fama: A bill has been introduced in the California legislature that, if enacted, will ban diacetyl use after January 1, 2009. This product is ubiquitous, and such a step would have a profound impact on the entire baking industry. To say nothing of the fact that many other states would follow California’s lead with similar legisla- tion.

At the global level, given the recalls relating to Chinese consumer products, we can anticipate greater governmental regula- tion over the importation of all goods. This is not necessarily a bad thing if it results in an increase in the resources channeled to the FDA and the USDA, which has been underfunded for a very long time.

Editor: Where is products liability lit- igation headed?

Purtos: In an earlier era, a plaintiff would take a product to a lawyer, and the lawyer would look at the product itself in attempting to determine whether it had caused injury. Today, we are dealing with additives, flavorings, and the like. The plaintiff is looking into the ingredients in the product itself and not just into its basic components and analyzing underlying chemicals. That creates many more avenues for the “plaintiffs’ bar,” be it a can of hairspray, or a tube of rubber cement might contain 50 distinct chemicals — and the plaintiffs’ lawyer is going to attempt to show the ill effects of an exposure to 50 pounds of each of these components over a 10-year period. As a result, be it one case nevertheless, which may well survive to trial. The defense bar will rise to the challenge, but it is going to be achieved overnight. Right after, the defense bar and a group of informed clients, acting together in proactive mode, will prevail over time.

Please email the interviewees at rfama@cozen.com or mpurtos@cozen.com with questions about this interview.